No. 80-1426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ZEIGLER COAL COMPANY, an Illinois Corporation,
Petitioner,

v.

PHILLIP A. DETHLOFF and DOROTHY J. DETHLOFF,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF AMICI CURIAE IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT:	
I.	
The Illinois Supreme Court's Decision Blindly Ignores The Commercial Consequences Of Retroactive Punishment Of Coal Companies Whose Only Error Was Failure To Obtain Heretofore Unnecessary Declaratory Judgments	3
II.	
The Illinois Supreme Court's Decision Violates The Rights Of Lessee Coal Companies To Fair Notice Of That Conduct Which Will Precipitate Penal Sanctions	6
CONCLUSION	8

LIST OF AUTHORITIES CITED

Cases

Bouie v. City of Columbia, 378 U.S. 347 (1964)	7
Chevron Oil Co. v. Huron, 404 U.S. 97 (1971)	7
Grayned v. City of Rockford, 408 U.S. 104 (1972)	7
A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925)	7
U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977)	7
Welch v. Henry, 305 U.S. 134 (1938)	7

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INTEREST OF THE AMICI CURIAE

Your *amici* are coal operators mining millions of tons of America's most plentiful energy resource. These companies and their predecessors have operated for decades under leasing arrangements that often involve complex legal documents. The decision of the Supreme Court of Illinois holds that a coal company's good faith reliance on advice of counsel in interpreting such documents is of no legal value and that failure to arm itself with a declara-

tory judgment in every mineral dispute—past or present—subjects a coal company to punitive damages. That holding greatly inhibits the orderly development of coal fields throughout the country.

Furthermore, the imposition of a punitive measure of damages as a matter of law for failure to comply with duties retroactively imposed by the Supreme Court of Illinois adversely and unfairly affects all coal companies who have encountered similar lease disputes in the past several years and proceeded to mine without obtaining a declaratory judgment. They, like Petitioner Zeigler, will retroactively be exposed to millions of dollars in penal sanctions. Also, as producers whose financing, production, and sales agreements have relied upon legal documents which will now be meaningful only at great litigation expense, only at risk of penal sanctions, and only at risk of a court's finding—without hearing—that reliance on the document should be punished as bad faith, your *amici* have suffered a disruption of business expectations that makes the Illinois Supreme Court's unfairness a matter of immediate and significant concern.

Your *amici*, therefore, respectfully support Zeigler Coal Company in its efforts to secure a writ of certiorari from this Court to review the decision of the Supreme Court of Illinois herein.

SUMMARY OF THE ARGUMENT

Retroactive punishment of energy producers, whose punished conduct was undertaken in reliance upon advice of counsel and cannot now be changed, violates the constitutional right of fair warning. The Illinois Supreme Court's egregious constitutional denial of due process, imposing penal sanctions without warning and without a hearing, has unfairly disrupted expectations in the energy industry and unconstitutionally exposed both the Petitioner and the *amici* to penal sanctions of unprecedented proportions.

ARGUMENT

I.

THE ILLINOIS SUPREME COURT'S DECISION BLINDLY IGNORES THE COMMERCIAL CONSEQUENCES OF RETROACTIVE PUNISHMENT OF COAL COMPANIES WHOSE ONLY ERROR WAS FAILURE TO OBTAIN HERETOFORE UNNECESSARY DECLARATORY JUDGMENTS.

The unfairness of the Illinois Supreme Court's retroactive and punitive disruption of mining agreements and the uncertainty caused by its decision warrant review by this Court. Purchasers of coal, such as public utilities and municipal entities, whose long-term buying commitments depend upon the existence of "proven reserves," will be adversely affected by the dramatic alteration in their suppliers' lease rights that has been effected by this decision.

The ability of coal producers, whose massive financing requirements have been satisfied only by reliance upon "proven reserves" and certainty of property rights, to satisfy energy needs and, indeed to continue operation, has been jeopardized by the Illinois decision that renders reliance upon legal opinions of reputable counsel a nullity, subjects corporations to punitive sanctions as a matter of law and without any indication of scienter, and retroactively destroys the legal principles upon which parties have relied in undertaking conduct for which they may now be punished.

In the name of punishment and deterrence a majority of the Supreme Court of Illinois has ordered lessee coal companies to litigate every adverse lease claim. Failure to do so will, as in this case, expose the company to punitive damages in amounts almost 100 times the contract value of the coal. Once the owner complains, the lessee coal company must abandon its claimed rights or litigate them in declaratory judgment proceedings before continuing the energy development that has recently been made America's highest energy priority.

Lessee coal companies have never before been required to renegotiate leases that they believed, in good faith reliance on the advice of counsel, to be valid and enforceable. Nor have they ever before been required to seek a declaratory judgment to protect themselves from punitive damages when relying on advice of counsel that a lease is valid and enforceable. Failure to do so in this case, however, precipitated penal sanctions. These sanctions were imposed as a matter of law, despite advice of counsel and lack of fair warning.

A coal company's efficient development of an entire coal seam may, as in this case, depend upon numerous

variables that cannot be held constant in ignorance of economic consequences, while every minor dispute is litigated. Yet, litigation is guaranteed by the asymmetry of risks created by the Illinois Supreme Court. The landowner is encouraged to dispute even the most reasonable lease interpretation since he cannot lose the price he has contracted to receive for the coal, but may gain millions of dollars in punitive damages if he is successful. The coal company, of course, must always stop mining, since its risk is measured in millions of dollars, and since its sincere belief in its legal position—even when buttressed by advice of reputable counsel—is now irrelevant. Herein, for example, the lessor pursued a previously unknown interpretation of a coal lease and, despite the lessee's reliance on advice of counsel, was rewarded a hundredfold with punitive damages.

Mining companies cannot avoid leasing disputes regarding duration, location, and scope of mineral rights. The relevant Illinois statute of limitations keeps such disputes alive for five years. Many mining companies may have engaged in mining operations in the last five years that might now be made subjects of trespass actions under the interpretation by the courts below of the Zeigler lease, or under other leases. Actions that did not then require an antecedent declaratory judgment will now be held in bad faith under the Illinois Supreme Court's decision wherein Petitioner was held liable for failure to comply with a duty of which it was unaware when it was mining the Dethloff property.

The Supreme Court of Illinois has, by giving trespass plaintiffs an unprecedented incentive for suit, ensured not only that future disputes will arise over even minor parts of the leasing relationship, but also that any possi-

ble claim in the last five years will be resurrected by plaintiffs and attorneys eager for punitive judgments as a matter of law.

II.

THE ILLINOIS SUPREME COURT'S DECISION VIOLATES THE RIGHTS OF LESSEE COAL COMPANIES TO FAIR NOTICE OF THAT CONDUCT WHICH WILL PRECIPITATE PENAL SANCTIONS.

Recognizing that if the industry were to avoid constant litigation of every dispute, it had to be able to rely on reputable counsel's assessment of lease rights and duties, courts have consistently upheld the rights of mineral firms to rely on advice of counsel when proceeding to mine under disputed claims. The decision in *Dethloff* disregards, as a matter of law, the rule of law most often relied upon by courts in adjudicating the good or bad faith of trespassers. Every company engaged in mineral extraction has relied upon the rule that action upon advice of counsel will be treated fairly; it will not be insulated from liability, but will be evaluated as probative of good faith. As a result of the decision below of the Supreme Court of Illinois, however, every company in this industry now faces the threat of retroactively-applied penal sanctions without consideration of reliance on counsel, or with only a facade of such consideration by the court as a matter of law.

The unavoidable injustice of the Illinois court's decision to impose penal sanctions stems from the inability of coal company defendants to now change their behavior in past leasing disputes. Neither Zeigler, nor any other company, can now go back in time and obtain the declaratory judgment required by the Illinois opinion. Rather, for

conduct that is irreversible, the coal companies will now be punished.

This Court has not tolerated retroactive imposition of punitive sanctions. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court underscored the importance of giving defendants the opportunity to modify their conduct in accordance with the law:

> ". . . [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The principle underlying *Grayned* is applicable to civil or criminal punitive sanctions, since the designation of punishment cannot change its penal character. *See, e.g., A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). Moreover, as was explained in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the right of fair warning can be violated by either judicial or legislative articulation of the law.

Herein, neither Zeigler, nor other firms who are likely to meet Zeigler's fate should be punished without fair warning. Such punishment is a violation of due process (*U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 17n.13 (1977); *Welch v. Henry*, 305 U.S. 134, 147 (1938)) and is antithetical to the principles of fairness relied upon by this Court in past cases presenting similar issues. Where, as in this industry, the *past* conduct can be neither deterred nor corrected, punitive sanctions further no constructive purpose. *Cf. Chevron Oil Co. v. Huron*, 404 U.S. 97 (1971). Nonexistent gains from retroactive punishment cannot overcome the equities in favor of those who relied

on formerly universal principles of law and whose constitutional right to fair warning would be rendered meaningless by retroactive punishment.

CONCLUSION

Your *Amici Curiae* urge this Court to grant the Petition for a Writ of Certiorari to the Supreme Court of Illinois, filed by the Zeigler Coal Company, and to reverse the decision of the Supreme Court of Illinois below.

Respectfully submitted,

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